February 25, 2011

Issue of Timing Arises Again: Alberta Court of Queen's Bench Quashes Decision of Information and Privacy Commissioner for Reasonable Apprehension of Bias

By Linda McKay-Panos

Cases Considered:

Alberta Teachers' Association v Alberta (Information and Privacy Commissioner), 2011 ABQB 19 ("*Wright*")

Once again, the issue of timing in the investigation of privacy complaints has been raised. In *Alberta Teachers' Association v Alberta (Information and Privacy Commissioner*) ("*Wright*"), pending litigation on the issue of timing currently before the Supreme Court of Canada ("SCC") prevented the Alberta Court of Queen's Bench from dealing with the timing issue; see the "Supreme Court hears Alberta Privacy Case" post commenting on *ATA News v Information and Privacy Commissioner*, 2010 ABCA 26 ("*ATA News*"). Nevertheless, since timing was raised again as an issue in *Wright*, the outcome of the SCC decision in *ATA News* will be important.

Angela Wright complained that the Alberta Teachers' Association ("ATA") had breached her rights under the *Personal Information Protection Act* SA 2003 c P-6.5 ("PIPA"). She had applied to the Teacher Qualifications Committee ("TQC") of the ATA for reassessment of her qualifications. After the committee re-evaluated Ms. Wright's qualifications, it sent her a letter on May 5, 2008. The letter went astray. Ms. Wright telephoned the ATA on May 9, 2008. It turned out that the letter had been mailed to another ATA member in Red Deer. The unintended recipient was instructed to mail the letter back to the ATA and it was then sent to Ms. Wright. The TQC's decision was subsequently appealed by Ms. Wright and dealt with by the TQC Board on December 2, 2008.

On January 29, 2009, Ms. Wright wrote to the Privacy Commissioner to complain about the misdirected mail and subsequent telephone contact with respect to it. The Privacy Commissioner opened a file on the matter and notified the ATA on February 9, 2009 that he had authorized an investigation of the complaints. The portfolio officer assigned to the complaints, Ms. Clayton, investigated them and wrote to the ATA on March 3, 2009, providing details of the complaints and identifying Ms. Wright. Ms. Clayton prepared a report on May 18, 2009, essentially dismissing the complaints. The report was sent to both Ms. Wright and the ATA. Ms. Wright wrote to Ms. Clayton on June 4, 2009, requesting that the matter be sent to an Inquiry. On June 15, 2009. Ms. Clayton advised the ATA that Ms. Wright had requested an Inquiry and that the matter had been sent to the adjudication unit. In addition to advising the ATA that the Commission would advise the ATA of the date of the Inquiry, the letter also advised that the Commissioner had extended the time for completing the review of the case "in accordance with section 50(5)" of PIPA. The date for completion was then extended to July 31, 2009, and the ATA was informed of the extension in a letter dated April 24, 2009.

The next time the ATA heard from the Privacy Commissioner was in a letter dated March 10, 2010, in which he noted that there would be an Inquiry and that the office was preparing a Notice of Inquiry. The ATA responded on March 19, 2010, indicating that it objected to the timeline and also to the nature of the complaint itself. Referring to the *ATA News* decision, the ATA argued that the Privacy Commissioner had not properly extended the mandatory time under PIPA s. 50(5). The ATA noted that the Privacy Commissioner's letter of March 10th did not refer to any prejudice that might result if he did not hold an inquiry. Further, the ATA argued that continuing the inquiry would be outweighed by prejudice to the values to be served by the PIPA. Finally, the ATA stated: "Kindly confirm to the parties at your very earliest opportunity that the inquiry is hereby terminated" (para. 14).

Ms. Wright was provided with a copy of the ATA's response, and, in a letter dated March 30, 2010, she indicated that she was shocked by its aggressive tone, and then proceeded to deal with the merits of the case. On April 27, 2010, the Privacy Commissioner issued Decision P2010-D-001, in which he indicated that the Inquiry had not been terminated and that the ATA had 45 days to take that decision to judicial review. The Privacy Commissioner also made concluding observations that indicated, among other things, that the ATA's delayed objection seemed to defeat the ultimate purposes of the legislation, and the request for termination was not appropriately respectful (para. 18).

The ATA sought judicial review of the decision. Initially, one of the central issues was whether the Privacy Commissioner had lost jurisdiction because of the passage of time and the decision in *ATA News*. However, the ATA withdrew that issue because the *ATA News* appeal was scheduled to be heard and the Commissioner had decided to stay the application until after the Supreme Court of Canada decision had been made.

The claims that were heard on the application for judicial review were:

> [22] The remaining claims by the ATA are for:
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> > 1. *Certiorari* quashing Decision P2010-D-001 (the "Decision");
> > 2. A declaration that the Commissioner fettered his discretion to screen complaints pursuant to ss. 36(2)(e), 49 and 50(1) of PIPA by accepting a *de minimus* complaint and a complaint raised outside the timeline for requesting a review pursuant to s. 47(2) of PIPA;
> > 3. A declaration that the Commissioner fettered his discretion to screen complaints arbitrarily and in an unwarranted and unreasonable manner;
> > 4. A declaration that the comments of the Commissioner in the decision give rise to a reasonable apprehension of bias in that they:
> > (A) contain comments about the motives and conduct of organizations such as the Applicant that the Commissioner has stated publicly;
> > (B) attribute bad faith and dishonesty and improper motives to the Applicant;
> > (C) show such a predisposition in favour of the Complainant that the Inquiry should not remain or continue in the hands of the Commissioner;

(D) reflect a closed mind and evince prejudgment; and
(E) are not impartial and disinterested in respect of their characterization of the Applicant's motives.
5. Prohibition prohibiting the Commissioner from taking any further action in relation to the matter under inquiry;
6. *Mandamus* directing the Commissioner to remove Orders and Decisions,
including the Decision, that have been quashed by the Court on review from the OIPC [Office of the Information and Privacy Commissioner's] Website, or post them in every case with accompanying notice that they have been quashed on judicial review; and
7. Costs.

In the end, the applicant ATA was successful in arguing one of the grounds for *certiorari* (quashing the decision of the Privacy Commissioner), but not successful on the other grounds. The reviewing judge, Mr. Justice R.A. Graesser, held that there was a reasonable apprehension of bias demonstrated by the Commissioner's comments in Decision P2010-D-001. The court noted that the Privacy Commissioner was "obviously unhappy with the Alberta Court of Appeal's decision in *ATA News*" (para. 134). In addition to seeking leave to appeal to the SCC, the Commissioner also issued a news release commenting on the Alberta Court of Appeal's decision (see blawg at http://ablawg.ca/wp-content/uploads/2010/02/blog_lmp_ata-privacycommissioner_abca_feb2010.pdf). Justice Graesser noted (at para. 136) that in having an opinion and expressing comments on judicial decisions, the Privacy Commissioner "must be careful not to prejudge, or give the impression of prejudging matters before him or which might come before him."

Justice Graesser held that the Privacy Commissioner's comments in Decision P2010-D-001 echoed the comments in his news release. He held (at para. 138) that the clear implication from the decision and the comments was that the Commissioner considered that the ATA was being disingenuous in its position on delay. At the same time, the comments about the ATA's disrespectful letter did not display bias and that aspect of the allegation of bias was held to be without merit (para. 141).

Thus, based on the test for a reasonable apprehension of bias as set out in the dissenting reasons in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 ("what would an informed person, viewing the matter realistically and practically – and having thought the matter through - conclude?"), the unjustified concluding remarks by the Privacy Commissioner in the decision clearly gave rise to a reasonable apprehension of bias. As such, the ATA was entitled to an order prohibiting the Privacy Commissioner from any further involvement in Ms. Wright's complaints, except for the exercise of his power to delegate his functions to others (para. 172). The first order of business was for the Commissioner to appoint a delegate to deal with Ms. Wright's complaints; the delegate would initially have to decide whether the matter should proceed to an Inquiry over the objections of the ATA (para. 174).

Since the issue of bias was clearly tied to the Privacy Commissioner's concerns about the interpretation of PIPA section 50(5) and his view that organizations were "selectively relying on the timing provisions of the Act" to use technical arguments to defeat valid complaints, it will be very interesting to see the outcome of the *ATA News* case.